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conclusion upon the ground stated in the judgment of Oldfield J., that on grounds of equity the Muhammadan Law in claims of pre-emption had always been held to bind Muhammadans and had always been administered between them. The Muhammadans were found as between themselves to hold property subject to the rules of Muhammadan Law, and it was not considered equitable that persons, who were not Muhammadans, but who had dealt with Muhammadans in respect of property, knowing perfectly well the conditions and obligations, under which the property was held, should, merely by reason that they were not themselves subject to Muhammadan Law, be permitted to evade those conditions and obligations. This reasoning cannot apply to cases arising in a District where the right of pre-emption is not shown to have been exercised even as between Muhammadans, and where the persons not themselves subject to Muhammadan Law cannot be properly held to know that a Muhammadan holds the property in that District subject to the obligation of offering it to his neighbours before selling it to a stranger.

Appeal dismissed.

R. R.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice and Mr. Justice Shah.

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December 10.

GANGABAI PEERAPPA MINOR BY HER GUARDIAN *ad litem* HOWANNA BIN NILLAPPA (ORIGINAL DEFENDANT), APPELLANT *v.* BANDU BIN PEERAPPA (ORIGINAL PLAINTIFF), RESPONDENT.*

Hindu Law—Sudras—Inheritance—Illegitimate son—Extent of share.

Among Sudras an illegitimate son of a concubine stands on the same level as to inheritance as the *dasi putra*, and the extent of his share in competition with a legitimate daughter would be one-half of the share taken by the daughter, that is, one-third of the whole estate.

* Second Appeal No. 668 of 1914.

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SECOND appeal against the decision of Dr. F. X. DeSouza, District Judge of Sholapur, confirming the decree passed by G. L. Dhekne, Subordinate Judge at Sholapur.

The property in suit belonged to one Pirappa who was by caste a Lingayat. Pirappa died in 1907 leaving him surviving a Lagna wife by name Limbabai who had no issue; a Mohatar wife who had two daughters, one of them being Gangabai (defendant). He had also an illegitimate son Bandu (plaintiff) by a concubine Sitabai, who was by caste a Shimpi woman. At the date of the suit all these persons except the plaintiff and the defendant were dead. The plaintiff sued as the *dasi putra* of Pirappa to recover possession of the property belonging to him.

The defendant contended that the plaintiff had no interest in the property as he could not claim the position and rights of a *dasi putra* according to Hindu Law.

The Subordinate Judge held that the plaintiff was the illegitimate son of Pirappa and was entitled to one-half share in the property.

On appeal, the District Judge, confirmed the decree.

The defendant preferred a second appeal.

J. R. Gharpure, for the appellant.

K. H. Kelkar, for the respondent.

SHAH, J.:—One Pirappa, by caste a Lingayat, died in 1907 leaving him surviving a wife, Limbabai, who had no issue, a Mohatar wife, who had two daughters, and the present plaintiff who claims to be his illegitimate son by a concubine Sitabai, who was by caste a Shimpi woman. All these persons except the plaintiff and the defendant who is one of the daughters by the Mohatar wife, are dead.

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The plaintiff sued to recover possession of the property of Pirappa from the defendant. The defendant urged that the plaintiff had really no interest in the property as he could not claim the position and rights of a *dasi putra* according to Hindu Law, and it was also urged that the connection between Sitabai and Pirappa being adulterous and forbidden by law, the text applicable to a *dasi putra* would not apply to the plaintiff.

The plaintiff's claim for the whole property was not allowed; but it was found that he was a *dasi putra* and as such entitled to a moiety of the property in suit, and a decree was passed by the trial Court on that footing. The lower appellate Court has affirmed the decision of the trial Court.

It is found by both the lower Courts that the plaintiff is the illegitimate son of Pirappa, who had kept Sitabai as his mistress. It is also found that Sitabai's husband died when she was very young, and that she was a widow living with Pirappa, when the present plaintiff was born.

It is common ground that the parties are governed by the law applicable to Sudras.

Mr. Gharpure's first contention is that the plaintiff is not a *dasi putra*, that he is born of an adulterous connection forbidden by law, and that the texts relating to an illegitimate son do not apply to him. It is clear, however, that the condition that the Sudra woman of whom the illegitimate son is born, should never have been married to any man has been discarded in the Presidency of Bombay as pointed out by Sir Michael Westropp, C.J. in *Rahi* v. *Govinda valad Teja*.[1] It is also observed in the same case at page 115 of the report and the observation is repeated in the later case of *Sadu* v. *Baiza*[2] that among Sudras the illegitimate

(1) (1875) 1 Bom. 97 at p. 113. (2) (1878) 4 Bom. 37 at p. 54.

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sons of a kept woman or concubine are on the same level as to inheritance as the *dasi putra* or the son of a female slave by a Sudra. It is clear that Sitabai's connection with Pirappa as his mistress being established, the present plaintiff, who was born when that connection subsisted, must be treated as the illegitimate son of Pirappa and is entitled to all the rights, which a *dasi putra* would be entitled to on the facts of this case.

The second question raised in the course of the argument is that in any case the lower Courts are wrong in allowing the plaintiff a moiety of the whole property, and that the plaintiff is entitled to a moiety of the defendant's share, i. e., to one-third of the whole estate. This point was not raised in either of the Courts below and has not been taken in the memorandum of appeal here. We have allowed the point to be argued, though not without reluctance, as it was pressed upon our attention as a point of law not involving any fresh finding of fact. An examination of the texts and the decided cases bearing on the point shows that the point is by no means easy to decide. We feel certain, however, that whatever may be the proper share to be awarded to the plaintiff it could not be more than one-third of the whole estate.

At the outset it may be mentioned that Pirappa had two daughters. But it is not suggested by Mr. Gharpure that on that ground on the footing upon which he argues for the plaintiff's share being one-third, his share would be really one-fifth of the whole estate. This aspect of the question has not been put forward in the argument, and we mention it only for the purpose of making it clear that the extent of the plaintiff's share is determined on the footing that Pirappa had only one daughter.

The fact that Pirappa left two widows behind him, makes, in our opinion, no difference in the *extent* of the plaintiff's share. The point whether in the case of daughters and an illegitimate son, the widow of the deceased has only a right of maintenance or takes the estate of the deceased to the exclusion of the daughters is a point upon which there has been some difference of opinion; but that question really does not arise in this case. It is enough to point out that it has nothing to do with the extent of the illegitimate son's share which must be determined with reference to the number of legitimate sons or daughters or daughters' sons. The question of the extent of the illegitimate son's share has not been considered and decided in any of the cases bearing on the widow's right, which only dealt with the point whether she had any right to the property either when there were illegitimate sons or when there were legitimate daughters and illegitimate sons.

The provision as to the extent of an illegitimate son's share is to be found in the Mitakshara, Chapter I, Section XII, placita 1 and 2 : (see Stokes' Hindu Law Books, p. 426). Yajnyavalkya's text (Vyavaharadhyaya, verse No. 134) contains the word *ardhabhagika* (अर्धभागिक), which is translated by Colebrooke as partaker of the moiety of a share. It is explained in the commentary by Vijnaneswara that after (the demise of) the father, if there be sons of a wedded wife, let these brothers allow the son of the female slave to participate for half a share : that is, let them give him half (as much as is the amount of one brother's) allotment. It is further pointed out that if there be daughters of a wife, the son of the female slave participates for half a share only. Speaking with reference to the daughters, Vijnaneswara uses the word *ardhabhagika* (अर्धभागिक) about the illegitimate son, which is the word used in Yajnavalkya's text, and which has been explained

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by him in the previous part of the commentary with reference to the sons of a wedded wife as meaning a sharer to the extent of one-half in a brother's allotment. Having regard to the context as well as the language used by Vijnaneswara, there can be no doubt that the illegitimate son in competition with a legitimate daughter would have the same share as he would have in competition with a legitimate son. It may be that in some decided cases this view may not be found to have been uniformly acted upon. But there is no discussion on this point and we feel quite clear that the illegitimate son's share in this case should be calculated on that footing.

The question, however, as to the extent of that share is not so free from difficulty. There are two methods of determining the extent of the share. One method is to divide the whole estate in such a way as to give to each of the illegitimate sons exactly half of the share of each of the legitimate sons. The other method is to divide the estate into as many shares as there may be sons, treating the illegitimate sons as legitimate sons, and then from one share to give half to each illegitimate son, and give the remainder to the legitimate sons. To take the simplest instance, if there be one legitimate son and one illegitimate son, according to the first method, the whole estate would be divided into three shares, two shares going to the legitimate son and one share to the illegitimate son. According to the other method the estate would be divided into two shares, and the illegitimate son will be given half of one share, that is, one-fourth of the whole estate, and the remaining portion, that is, three-fourths of the whole will go to the legitimate son. This second method has been adopted by Vijnaneswara himself in dealing with the share of a sister. It has been explained by him at length in Chapter I, Section VII, placita 6 to 10 (Stokes'

Hindu Law Books, pp. 398—400). If we had to make a choice between the two methods for the first time, as a matter of proper construction we should have been inclined to adopt the second method. The expression explained in Section VII, placita 6 to 10 by Vijnaneswara is *Nijadanshat* (निजादंशात्) which is used by Yajnavalkaya in verse No. 124, while the expression used by him in Section XII, pl. 2, is *swabhagat* (स्वभागात्) which is synonymous with the former. It is, however, unnecessary to pursue this point any further, as we think that the second method of determining the extent of the illegitimate son's share cannot be accepted now, though, in our opinion, it has the merit of Vijnaneswara's approval. In the first place Mr. Gharpure has not argued that it is the proper method to be adopted now. The decided cases in this Presidency show that it is the former method that is adopted, and the second method, though not expressly considered, must be deemed to have been rejected by necessary implication. Lastly, the other High Courts also adopted the first mentioned method. On a point of this kind it is important that a rule once laid down should be adhered to unless there are exceptionally strong and clear grounds to justify a departure therefrom.

The case of *Dhodyela and Sanyela Rainaika* v. *Malanaik*[1] decided by Melvill and Pinhey, JJ. shows that the shares of the illegitimate sons were calculated according to the first method. The same rule was adopted by Melvill J. in *Sadu* v. *Baiza*.[2] Though his judgment was upset in appeal on a different ground, the learned Judges in appeal expressed a clear opinion in favour of the view of Melvill J. on the point, now under consideration, though it was not necessary for the decision of the case. They observed (at page 52 of the report) that "If Mahadu had not survived his

(1) (1874) P. J. 43. (2) (1878) 4 Bom. 37.

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father Manaji, then, indeed, under Mitakshara, Chapter I, Section XII, pl. 2, Sadu would have been entitled to only half a share, i. e., one-third of the property, and the remaining two-thirds would have vested in Darya as the legitimate daughter of Manaji."

The same view has been recently taken in *Chellammal* v. *Ranganatham Pillai*,[1] and the Allahabad High Court took the same view long ago in *Kesaree* v. *Samardhan*.[2]

Mr. Kelkar relied upon the case of *Shesgiri* v. *Girewa*[3] for the proposition that the illegitimate son would be entitled to a moiety of the estate. In that case, however, the plaintiff, who was one of the daughters, was awarded one-sixth share of the whole estate and the illegitimate sons, who were among the defendants, were allowed a moiety of the whole by the District Court. The illegitimte sons appealed against the decree and the plaintiff-daughter had filed no cross-objections. The only point urged before, and decided by, the High Court was, whether the illegitimate sons excluded the widow and the daughters altogether. The true extent of the plaintiff-daughter's share was not decided by the High Court. The remark of Sir Charles Sargent, C.J. that the illegitimate sons were entitled to a half share, apparently based upon the observation of Sir Michael Westropp, C.J. in *Rahi* v. *Govinda valad Teja*[4], is apt to be misunderstood. No doubt, at p. 115 of the report of *Rahi* v. *Govinda valad Teja*[4], it is stated that the illegitimate son is entitled to a half share. But in order to understand whether it was half of the whole estate or half of a legitimate son's share, it is necessary to bear in mind the observations at page 104 of the report, where Sir Michael Westropp, C.J.,

(1) (1910) 34 Mad. 277.
(2) (1873) 5 N.-W.P. H. C. R. 94.
(3) (1889) 14 Bom. 282.
(4) (1875) 1 Bom. 97 at p. 113.

after referring to the Mitakshara, Chapter I, Section XII, observes that "If there be a legitimate daughter or legitimate son of such a daughter, the illegitimate son would take only half the share of a legitimate son; and such daughter or daughter's son would take the residue of the property." Even if there be any doubt as to what was meant by that passage, Sir Michael Westropp's dictum in the later case of *Sadu* v. *Baiza*,[1] which is already quoted, makes the meaning abundantly clear. There is no reason to suppose that Sir Charles Sargent did not understand Sir Michael Westropp's observation in that sense, and though the decree of the District Court in *Shesgiri's* case may not be consistent with the view, which we have already expressed as being the correct view to take of the extent of the illegitimate son's share, it is clear that there is nothing in the decision of the High Court which is inconsistent with that view. The point considered and decided in *Meenakshi Anni* v. *Appakutti*[2] was that the widow did not exclude the illegitimate sons altogether. The question as to the extent of the illegitimate son's share in competition with a legitimate daughter apparently did not arise in that case and was not decided.

For these reasons we are of opinion that the plaintiff is not entitled to more than a third of the property in suit. We accordingly modify the decree of the lower appellate Court by directing that the plaintiff should be awarded on partition one-third of the property in suit. In other respects the decree should be confirmed. Under the circumstances the appellant must pay the respondent's costs of this appeal, as the grounds mentioned in the memorandum of appeal have failed.

Decree modified.

J. G. R.

(1) (1878) 4 Bom. 37.

(2) (1909) 33 Mad. 226.